

TREASURY-TAXATION  
DIVISION OF TAXATION

Unfair Cigarette Sales Act Rules

Proposed Readoption with Amendments: N.J.A.C. 18:6

Authorized By: Robert K. Thompson, Director, Division of Taxation

Authority: N.J.S.A. 56:7-31.

Calendar Reference: See Summary below for explanation of exception  
to calendar requirement

Proposal Number: PRN 2004-

Submit comments by **April 17, 2004** to:

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The agency proposal follows:

### Summary

Pursuant to Executive Order No. 66 (1978), N.J.A.C. 18:6 expires on February 4, 2004. The Division of Taxation has reviewed these rules and has determined them to be necessary, reasonable, adequate, efficient, and responsive for the purpose for which they were originally promulgated. The proposed readoption includes amendments that are intended to clarify the current regulations regarding manufacturers' promotional sales plans and increase the Division's ability to effectively enforce and administer the regulations. Increasing the Division's notification period prior to the inception of a manufacturer's promotional sales plan, as well as clarifying the Sales Tax collection requirements have been proposed. Minor modifications in language, such as inserting "shall" in place of "are to" have been proposed.

The wholesale and retail cigarette industry in New Jersey, prior to the enactment of the New Jersey Cigarette Tax Act in 1948, was characterized by severe and intense price competition and many unfair, dishonest, deceptive, destructive and fraudulent business practices which demoralized and disorganized the cigarette trade. Cigarettes were advertised, offered for sale or sold below cost with the intent of injuring competitors or destroying or substantially lessening competition.

The New Jersey Unfair Cigarette Sales Act of 1952 (N.J.S.A. 56:7-18 et seq.) was enacted as a companion law to the New Jersey Cigarette Tax Act (N.J.S.A. 54:40A-1 et seq.). Its purpose is to prevent unfair competition and unfair trade practices in the sale of

cigarettes in New Jersey which would adversely affect the prompt and efficient collection of taxes on the sale of cigarettes and the revenues and fees from licensing manufacturers, distributors, wholesalers, retailers, and other persons engaged in the sale of cigarettes in New Jersey.

The New Jersey Unfair Cigarette Sales Act declares it to be the policy of the State of New Jersey to promote the public welfare by prohibiting sales of cigarettes below cost. The original New Jersey Unfair Cigarette Sales Act (P.L. 1948, c.188) was found to be unconstitutional by the Supreme Court of New Jersey in 1951 (Lane Distributors v. Tilton, 7 N.J. 349, 81 A.2d 786 (1951)). The revised New Jersey Unfair Cigarette Sales Act of 1952 (P.L. 1952, c.247) reenacted the law to correct deficiencies in the original Act specified by the Supreme Court.

As there are numerous and often conflicting promotions offered by major tobacco companies, the manufacturer's promotional sales plan rules set forth at N.J.A.C. 18:6-4.2 and N.J.A.C. 18:6-4.3 need to be amended in order to ensure that the minimum prices for cigarettes are enforced as required by law.

The Division has noted some confusion about the application of the rules to promotions. Some cigarette manufacturers have been remiss in informing the Division about the date, length, and discount offered by specific promotions. This proposal amends the notification requirement set forth in N.J.A.C. 18:6-4.2 in order to give the Division sufficient time to review manufacturers' promotional sales plans to facilitate and effectuate compliance.

Moreover, some retail dealers have advised the Division that they were not notified of cigarette promotions as required by law. Retail dealers also stated that they were not being provided with a detailed written explanation of the promotions as required by law. Therefore, this proposal amends N.J.A.C. 18:6-4.3 by clarifying the language of the rule to make it clear that promotions must be made universally available to all retail dealers.

Promotions often offer substantial discounts in the price for cigarettes when purchased by a consumer. Some of these promotions last one quarter; sometimes they last an entire year. This rule proposal adds a new regulation at N.J.A.C. 18:6-4.8 that is intended to insure both that minimum pricing laws for cigarettes are enforced and that tax is paid on the minimum price regardless of promotional discounts.

Subchapter 1 contains general provisions, including definitions. Prohibitions of actions that lessen competition are found in subchapter 2. Subchapter 3 deals with price lists. Rules relating to manufacturer's promotional sales plans, including notification to the Division thereof and the requirement of a vendor to collect sales tax on cigarette sales during the promotional period are found in subchapter 4. Subchapter 5 deals with required reports. Remedies and penalties are contained in subchapter 6. Subchapter 7 contains miscellaneous provisions, including various aspects of sales and pricing, and the powers of the Director.

Because the Division has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

### Social Impact

The regulated cigarette industry has severe and intense competition. The cigarette industry generally, as well as the public, benefits socially from the Unfair Cigarette Sales Act and in the implementation of rules which addressed prior ambiguities.

### Economic Impact

The Unfair Cigarette Sales Act and the proposed rules provide for fairer business practices, a fair price for the product, a fair profit for the businesses involved and better trade and competition overall. Some minor additional bookkeeping expense may result from the clarification as to sales tax collection on promotional cigarettes.

### Federal Standards Statement

A Federal standards analysis is not required because the rules with amendments proposed for readoption are consistent with a State statute governing trade practices in the cigarette sales industry and do not involve any Federal standards.

### Jobs Impact

The rules with amendments for readoption are not anticipated to have an independent effect on jobs in the State.

### Agriculture Industry Impact

The rules with amendments proposed for readoption are not expected to have an impact on the agricultural industry.

### Regulatory Flexibility Statement

The rules with accompanying amendments proposed for readoption apply to all taxpayers subject to the New Jersey Unfair Cigarette Sales Act, N.J.S.A.56:7-18 et seq., whether or not they are a small business as the term is defined in the Regulatory Flexibility Act, N.J.S.A.52:14B-16 et seq. The rules are designed to implement and explain the operation of the Unfair Cigarette Sales Act, which prohibit sales of cigarettes below cost for all cigarettes sold both at wholesale and retail in New Jersey. Any exemption for small businesses would not appear to be in compliance with the statute.

The proposal will require some additional reporting and recordkeeping for many small businesses as sales tax must be charged at least on the minimum price allowable even where promotional sales allow for lower discounted prices. The initial and ongoing costs of compliance with this rule are insubstantial because the proposal only makes minor changes to current recordkeeping procedures. Therefore, there is no measurable adverse impact which would result on small businesses.

### Smart Growth Statement

The Department anticipates that the proposed amendment will have no impact on smart growth in New Jersey or on the implementation of the New Jersey State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

#### 18:6-4.2 Notification

Written notification must be given to the Director by every sponsoring manufacturer at least [ten] thirty days prior to the commencement of any manufacturer's promotional sales plan, including a description of the plan in detail and the dates and period of time during which the plan is to be operative.

#### 18:6-4.3 Sales campaigns [are to] shall be non-discriminatory

(a) Every manufacturer's promotional sales plan [is to] shall be universal and [is to] shall be made available simultaneously and on equal terms to each and every licensed retailer dealing in the sponsoring manufacturers' products.

(b) [No such] No manufacturer's promotional sales plan [may] shall discriminate in the placement of any promotional material, be selective as to time and place, or be limited to a restricted group or class of retailers.

#### 18:6-4.8 Collection of Sales Tax on Cigarette Sales during Promotions

(a) A retail vendor shall collect sales tax on the retail price, but not less than the minimum retail price (defined in Section 3.1 (Definitions) of this Chapter), of a pack or carton of cigarettes at all times during the period of a manufacturer's promotional sales plan even when a manufacturer reimbursable coupon is supplied by the purchaser to the retail vendor.